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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 8 2000

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00-10
Television Service	)	FCC 00-115
	)	
	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION, OR ALTERNATIVELY, FOR CLARIFICATION

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List A B C D E

Pursuant to §1.429(a) Paging Associates, Inc. ("PAI"), owner and operator of LPTV stations W28AJ, Allingtown, CT, and W28CA, Bridgeport, CT, hereby petitions for reconsideration of the *Report and Order, In the Matter of Establishment of a Class A Television Service*, MM Docket No. 00-10, FCC 00-115, released April 4, 2000, (hereinafter "*April 4th Report and Order*") because the Commission failed to follow the mandates of the Community Broadcasters Protection Act of 1999 ("CBPA"), Pub. L. No. 106-113, 113 Stat. 1536, codified at 47 U.S.C. § 336(f).

In support of this petition, PAI respectfully states as follows:

Factual Background

1. On November 29, 1999, President Clinton signed into law the Community Broadcasters Protection Act of 1999 (CBPA). The CBPA requires the Commission to "prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations." 47 U.S.C. § 336(f)(a)(1). The CBPA provides that "[s]uch regulations shall provide that--

> (i) the license shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection; and
> (ii) each such class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station in paragraph (2).

2. In enacting the CBPA, Congress expressly found that "a small number of [low-power] television holders have operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available." P.L. 106-113, Div. B, § 1000(a)(9), 113 Stat. 1536 (enacting into law § 5008(b) of the Title V of S. 1948 (113 Stat. 1501A-594). It further found that "[t]hese low-power broadcasters have operated their stations in a manner consistent with the programming objectives and hours of operation of full-power broadcasters providing worthwhile services to their respective communities while under severe license limitations compared to their full-power counterparts." Id. Congress found a need to provide additional rights for these stations, which operate in the "public interest to promote diversity in programming," because "[l]icense limitations, particularly the temporary nature of the license, have blocked many low-power broadcasters from having access to capital, and have

severely hampered their ability to continue to provide quality broadcasting, programming, or improvements." Id.

3. For these reasons the CBPA defined a station as a "qualifying low-power television station" if--

> (A)(i) during the 90 days preceding the date of the enactment of the Community Broadcasters Protection Act of 1999--
>
> (I) such station broadcast a minimum of 18 hours per day;
>
> (II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and
>
> (III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and
>
> (ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or
>
> (B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.

47 U.S.C. § 336(f)(2).

4. Consistent with these provisions, the Commission interpreted the Congressional intent of the CBPA as "intending to place Class A licensees on roughly even footing with full-service licensees..." *April 4 Report and Order*, ¶ 47.

5. In accordance with Congress' mandate that Class A licensees be "subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in [the CBPA]," 47 U.S.C. § 336(f)(1)(A)(i), the Commission placed the rules governing the new Class A service under Part 73. "As Class A stations must comply with the operating rules for full-service stations, which are found in Part 73, it appears most logical to group the rules for Class A service with the full-service broadcast rules." *April 4 Report and Order*, ¶ 31. Pursuant to the *April 4th Report and Order*, Class A applicants and licensees will be governed by all Part 73 rules, "except for those which are inconsistent with the manner in which LPTV stations are authorized or the lower power at which these stations operate." *April 4th Report and Order*, ¶ 21.

6. The Commission clearly recognized the distinction and responsibilities between an LPTV Part 74 station and a Class A Part 73 Licensee. "LPTV stations that are not eligible for or choose not to apply

for Class A status will continue to be governed by Part 74 of our rules." Id.

7. Despite such worthy intentions, certain regulations adopted by the Commission in the *April 4th Report and Order* will have the practical effect of denying Class A licensees many of the benefits of "primary status" as mandated by Congress in the CBPA. In addition, as a result of certain ambiguities in the regulations, Class A licensees will be denied certain rights and privileges accorded to other "primary service" television broadcasters in violation of both the provisions of the CBPA and the constitutional right to equal protection. *See Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (1985) (FCC must treat similarly situated parties similarly).

Standing of the Petitioner

8. PAI is the owner and operator of two LPTV stations, W28AJ, Allingtown, CT and W28CA, Bridgeport, CT. Because PAI meets the eligibility requirements set forth in the CBPA, on December 23, 1999, PAI filed certifications of eligibility with the Commission for Class A licenses for its stations. Applications for Class A licenses will be filed within the time constraints set forth by the Commission. As the owner and operator of low power television stations entitled to Class A licenses under the CBPA, PAI clearly will be adversely affected by the deficiencies of the *April 4th Report and Order*.

Reconsideration Issues

The following issues and proposals are respectfully submitted for consideration:

1. Mandatory Carriage

9. ¶ 23 & n. 48 of the *April 4th Report and Order* determines that Class A stations will not be subject to the NTSC and DTV Tables of Allotments contained in subpart E of Part 73 of the Commission's regulations (47 C.F.R. § 73.606 and § 73.607). By such action, the Commission effectively has denied primary status to Class A facilities in direct violation of the statutory mandate set forth in the CBPA, 47 U.S.C. § 336(f)(1)(A), because such action precludes Class A stations from mandatory carriage on any area cable or satellite system.

10. Under the Cable Television Consumer Protection and Competition Act of 1992, cable

operators are required to carry the signals of "local commercial television stations." 47 U.S.C. § 534(a). Under such Act, "local commercial television station" is expressly defined as "any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission that . . . is within the same television market as the cable system."[1] 47 U.S.C. § 534(h)(1)(A).

11. Similarly, under the Satellite Home View Improvement Act of 1999 [enacted November 29, 1999], a "television broadcast station" is defined as "an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations . . . " 47 U.S.C. § 325(b)(7)(B).

12. Because the Table of Allotments set forth in § 73.606 of subpart E of Part 73 is the device by which a television broadcast station operates on a channel regularly assigned to a particular community, 47 C.F.R. § 76.5(b), a television broadcast station necessarily will not receive the benefits of the mandatory cable and satellite carriage provisions unless it is included in the Commission's Table of Allotments.

13. Absent mandatory carriage on area cable and satellite systems, Class A stations clearly will not be "roughly equivalent" to other Part 73 "primary service" licensees as Congress intended. From an economic point of view, there can be no question that a television broadcast station that does not have mandatory cable and satellite coverage cannot be "roughly equivalent" to a primary service station having mandatory coverage. Denial of mandatory carriage will have the practical effect of preventing Class A stations from having access to capital and, therefore, will hamper their ability to continue to provide quality programming and improvements. Congress, in passing the CBPA, expressly stated its intent to eliminate license limitations having these effects. See P.L. 106-113, Div. B, § 1000(a)(9), 113 Stat. 1536. In addition, those "qualified LPTV stations" in rural markets, which now enjoy "must carry," necessarily

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[1] Although the statute expressly excludes low power television stations from the definition of "local commercial television station," it only excludes low power television stations that operate pursuant to part 74 of title 47, Code of Federal Regulations. Because low power television statutes granted Class A licenses operate under part 73, they are not excluded from mandatory cable coverage. Indeed, by definition, a Class A TV station is not a low power TV station, a Class A station is a full service station. Moreover, Part 73 is not a successor regulation to Part 74. Because a Class A station is a full service station, must carry is mandatory under the Communications Act.

would be denied carriage should they convert and leave Part 74, to become "primary service" Part 73 stations.

14. It surely was not the intent of Congress to make Class A stations subject to the same license terms and renewal standards as required for full power television stations while at the same time denying them one of the most important rights and privileges afforded to full power stations. Moreover, there is no reason to believe the Commission itself intended to deny Class A stations mandatory carriage. In a footnote contained in the *April 4th Report and Order*, the Commission expressly stated that "[n]othing in this *Report and Order* is intended to affect a Class A LPTV station's eligibility to qualify for mandatory carriage under 47 U.S.C. § 534." In addition, in Appendix A to the *Report and Order*, the Commission added a specific regulation requiring Class A television stations electing must-carry or re-transmission consent to retain records of such election. *April 4th Report and Order*, Appendix A, setting forth amendments to § 73.3526(a)(15). If the Commission had intended to preclude Class A stations from mandatory carriage, there would have been no need to add this record-keeping regulation concerning must-carry.

15. Not only does the Commission's exclusion of Class A stations from the Table of Allotments directly contradict the spirit and express language of the CBPA, it also raises constitutional equal protection issues in that Class A primary service stations are treated differently from other Part 73 primary service stations.

16. While there may be technical reasons to exclude Class A licensees from compliance with the NTSC and DTV Tables of Allotments, the Commission can accommodate this need without effecting a Class A station's eligibility for mandatory carriage by amending the requirements of the Tables of Allotments for Class A stations or otherwise making such stations *de facto* members under the tables. Such action would ensure that Class A licensees are accorded the same rights as other primary television broadcasters pursuant to the Congressional mandates set forth in the CBPA.

2. Market Area, Locally Produced Programming and Local Studio

17. In its Report and Order, the Commission has defined "market area" to encompass the "area within the predicted Grade B contour determined by the Class A station's height and power...". *April 4th Report and Order*, ¶ 18. This definition of market area differs greatly from the definition applicable to other primary service stations, where the market is determined by the station's Designated Market Area (DMA) as determined by Nielsen Media Research. See 47 C.F.R. § 46.55(e)(2). In most instances, the Grade B contour will be significantly smaller than the station's DMA. Indeed, in footnote 42 of the *April 4th Report and Order*, the Commission recognized that that the predicted Grade B signal contour of an LPTV station is typically not more than 20-25 miles and is generally smaller than the DMA, which normally encompasses several counties.

18. As previously discussed, the Commission only has authority under the CBPA to prescribe regulations for Class A stations that accord the Class A licensee primary status as a television broadcaster and that subject the license to the same license terms and renewal standards as licenses for full-power television stations except as provided in the statute. 47 U.S.C. § 336(f)(1)(A). For this reason, the Commission must define the market area of a Class A station in the same manner that it is defined for other Part 73 primary status stations.

19. Moreover, the public interest does not require a more restrictive concept of market area for Class A stations. By defining where a station's local content is to be produced based solely on contour curve, the Commission unnecessarily may prevent a station from wholly serving its community, thereby hindering the station's economic viability. Many LPTV stations have highly directional antennas that "cut off" the predicted Grade B contour in various directions, thereby creating unusual shaped contour patterns. If these reduced patterns of coverage are used to define "market area," it will have the practical effect of preventing production of local programs in the areas of the city based solely upon where the pattern falls. For example, a station might be able to locally produce football games on the west side of the city, but not the hockey games on the east side. This artificial determination of market area distorts the entire concept of local programming to the detriment of the public interest.

20. This restrictive market definition may deny a station's ability to purchase syndicated programming. Most syndicators issue only DMA-wide licenses and will not clear programming in fractions of a DMA for television stations. Without the ability to acquire additional quality programming and have its content considered as being released in a DMA, stations will be forced to either locally produce the 126 hours of programming per week required by the CBPA or pay for a DMA wide license without DMA-wide acceptability. For most stations, these options are too expensive to be economically feasible.

21. Other "market area" issues which create problems for the Class A licensees is the local studio placement within the Grade B contour, and the dynamic nature of accommodating maximized DTV allotments. If DTV maximization requires the change of a station's contour and the location of the new studio is no longer within the Grade B contour, the studio placement for the Class A station may become a "moving target." Because other primary service stations do not have their market areas defined by the Grade B contour, Class A licensees will be subject to burdens not encountered by full-power television stations.

22. The mandate of the CBPA is clear. Class A licensees must be subject to the same operating rules as full-power television stations. 47 U.S.C. §§ 336(f)(1)(A) and 336(f)(2)(B). For this reason, the Commission should reconsider its definition of "market area" for Class A stations so as to impose the same definition applicable to other primary status stations.

3. Interference Protection

23. The Commission decided to provide interference protection to Class A service areas in the same manner that LPTV stations protect NTSC stations and each other under Part 74. *April 4th Report and Order*, ¶¶ 76-81. For example, full-service analog TV stations will be required to protect class A stations by using the criteria set forth in section 74.705. *April 4th Report and Order*, ¶ 67. Similarly, class A stations will be protected from LPTV stations, TV translators and other Class A stations based on the protection requirements set forth in section 74.707. *April 4th Report and Order*, ¶ 70. With respect to the contour protection of digital class A stations, the Commission has decided to adopt the requirements

in section 74.706. Thus, under the Commission's *April 4th Report and Order*, the interference protection of Class A stations will be governed largely by the Part 74 LPTV rules rather than the rules applicable to other primary service stations.

24. While the CBPA does not specifically address interference protection of Class A stations, it plainly states that the regulations adopted by the Commission shall provide that Class A licensees "shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection . . . " 47 U.S.C. § 336(f)(1)(A). Since full-power television stations are governed by Rule 73, not Rule 74, the interference protection of Class A stations clearly must be governed by the same Rule 73 regulations applicable to full-power stations. Under the plain language of the CBPA, the Commission does not have the authority to do otherwise.

25. Moreover, the public interest does not require that the interference protection of Class A stations be governed by the LPTV rules. Any LPTV station that is granted Class A station under the CBPA necessarily cannot cause any additional interference to Part 73 coverage contours of full-power television stations because such stations are already currently in operations. Under the express provisions of the CBPA, only those LPTV stations that meet the statutory requirements for qualified low-power television stations during the 90 days preceding the date of enactment of the CBPA are eligible for Class A status. See 47 U.S.C. § 336(f)(2).

26. If Class A licensees are to be "roughly equivalent" to full-power television stations and subject to the same standards and license terms as full-power stations, they should be protected by the same Rule 73 interference regulations applicable to full-power stations, except where the rules clearly cannot apply.

4. Penalties

27. In the *April 4th Report and Order*, the Commission has failed to indicate whether Class A stations will be subject to Rule 73 regulations concerning fines and penalties. Absent such a regulation, there is some question whether a Class A licensee could be subject to loss of license for simply a one time failure to follow any of the requirements set forth in the CBPA.

28. In light of the plain language of the CBPA requiring the Commission to adopt regulations providing that Class A licensees are subject to the same license terms and renewal standards as the licensees for full-power television stations, except as provided in the statute, 47 U.S.C. § 336(f)(1)(A), the Commission should adopt a specific regulation stating that Class A licensees are subject to Rule 73 regulations concerning fines and penalties. Otherwise, a Class A station might be subject to different fines and penalties, such as complete loss of license, not applicable to other Part 73 primary service broadcasters.

5. The Suffix

29. In ¶ 116 of the *April 4th Report and Order*, the Commission decides "to allow Class A stations to use standard television call signs with the suffix "-CA" to distinguish the stations from "-LP" stations." This decision is at odds with Congress' intent that Class A stations be accorded primary status as a television broadcaster. 47 U.S.C. § 336(f)(1)(A).

30. The practical effect of the "-CA" suffix is that it distinguishes one "primary service" television station from another in a market. Program suppliers, advertisers, and the public at large will perceive a difference between like broadcasters as a group. Because four letter call signs, and four letter call signs with the " -TV" suffix, are used for other Part 73 primary service broadcasters, they too should be used for Class A stations. The "-CA" suffix only should be used when four letter call signs are exhausted, or by special request.

WHEREFORE, the petitioner respectfully requests that the *April 4th Report and Order* be reconsidered to:

1. delete the exclusion of the NTSC and DTV Table of Allotments for Class A stations, as set forth in section III.B.3 of the *April 4th Report and Order*, and to make Class A stations *de facto* members of such tables;

2. delete the definition of "market area" contained in section III.B.2., ¶¶ 17-20 of the *April 4th*

Report and Order, and to clarify that the "market area" of Class A stations shall be defined in the same manner as full-power television stations;

3. amend the regulations concerning interference protection set forth in section III.D. of the *April 4th Report and Order* so that Class A stations are protected from interference as any other primary service station except where the rules clearly cannot apply;

4. adopt a specific regulation stating that Class A stations are subject to the same fines and penalties as other primary service stations; and

5. amend section II.K.1 of the Report and Order to provide for the same four letter call signs assigned to other primary service stations.

Dated at West Haven, Connecticut this 7th date of June, 2000.

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By 

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